NO. 22,791

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARROW DEVELOPMENT COMPANY, INC., Appellant, v. THE FULTON INSURANCE COMPANY, Appellee.	)

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APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

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SUBJECT INDEX

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SUMMARY OF ARGUMENT

Argument No. 1

Appellant asks this Court to apply the rule that an insurance company owes its insured a duty of good faith and fair dealing completely independent of the provisions of the policy and hold that the contractual limitations on time to bring suit are therefore irrelevant.

Argument No. 2

This argument refutes appellee's contention that the contractual limitation of time should apply even if the present action sounds in tort.

Argument No. 3

This argument shows that, even if this action sounds in contract, the contractual limitation of time to bring suit was tolled by the filing of plaintiff's suit February 8, 1965, since the Alaska Mines and Minerals case is readily distinguishable and A.S. 09.10.240 provides a period in which suits dismissed not on the merits may be brought again.

ARGUMENT

I. THIS ACTION, LIKE CRISCI V. SECURITY INSURANCE CO., SOUNDS IN TORT; THEREFORE THE ONE YEAR CONTRACT LIMITATION ON TIME TO BRING SUIT ON THE POLICY WAS NOT APPLICABLE TO THE PRESENT ACTION.

If appellee is to prevail in this Court, it must distinguish the present case from Crisci v. Security Insurance Company of New Haven, Connecticut, 426 P.2d 173 (California 1967). This it has failed to do.

Crisci involved a somewhat different factual situation -- as counsel for appellee has pointed out -- but the underlying legal problem is the same. What obligation does an insurance company owe its insured outside the terms of the policy? The Court in Crisci (citing Comunale v. Trader & General Insurance Co., 328 P.2d 198 (California 1958) stated:

> " . . . that in every contract, including policies of insurance, there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefit of the agreement . . . " 426 P.2d 173, 176 (Emphasis added.)

It is the breach of this implied covenant of good faith and fair dealing for which appellant seeks recovery. It was for the breach of this covenant that the plaintiff in Crisci sued in tort and won.

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Appellee insists that this is a poorly disguised contract action. That simply is not so. In the contract action now pending in the Alaska courts, plaintiff need only show existence of the contract, satisfaction of the conditions precedent, and defendant's failure to perform. In this action plaintiff must show, in addition to the foregoing, that defendant defaulted on its obligation of good faith and fair dealing. A.S. 21.10.060 (cited on page 12 of appellee's brief) should be informative as to the extent of that obligation.

II. THE CONTRACT LIMITATION IN THE INSURANCE POLICY CANNOT GOVERN THE TIME FOR BRINGING AN ACTION BASED ON A DUTY COMPLETELY INDEPENDENT OF THE TERMS OF THE CONTRACT.

Appellee suggests that Reece v. Massachusetts Fire & Marine Insurance Company, 30 S.E.2d 782 (Georgia 1962), presented facts and issues similar to this case. Appellant suggests that this is not quite true. In Reece plaintiff tried to allege a tort action based on the insurance company's failure to give the written notice of cancellation required by the terms of the policy. The Court held that since the defendant's duty to give written notice "could only have arisen under the provision of the insurance policy . . . " (130 S.E.2d 782, 785), plaintiff was bound by the twelve month contractual limitation. The present case does not

arise under the provision of the policy, but quite independently. Since plaintiff does not base its action on the provisions of the policy, it is difficult to see the logic in the application of a term in the policy to bar the action.

Appellee then puts forth the suggestion that appellant failed to bring its action within two years (as required by A.S. 09.10.070). This contention is without merit; this suit was filed January 17, 1967 -- less than two years after the actions complained of. Paragraph VIII of the complaint alleges:

> "That plaintiff was informed of defendants refusal to pay plaintiff anything under its policy for plaintiff's loss on or about January 25, 1965 by defendant and its agents."

The complaint was filed less than two years later.

III. IF THE PRESENT ACTION SOUNDS IN CONTRACT, IT WAS TIMELY, SINCE THE LIMITATION PROVISION IN THE POLICY WAS TOLLED BY THE FILING OF PLAINTIFF'S COMPLAINT FEBRUARY 8, 1965.

Appellee cites cases to the effect that a statute of limitations defense "cannot be avoided by showing that another action had been brought within the time period allowed by the statute". Appellee's brief at page 19.

Although only one case (Barr v. Carroll, 274 P.2d 717 (California 1954))of the three cited stands for the proposition, appellant will accept it arguendo. If it is

true that this action is a contract action, then the proposition is irrelevant, since then it is the same action (within the meaning of Barr v. Carroll, supra) as the one filed February 8, 1965. If, on the other hand, this action is a completely separate tort action (as appellant strongly urges it is), then the proposition is again irrelevant, since, as we have seen before, the limitations period under discussion applies only to actions arising from the terms of the contract.

The appellee then cites two Kansas cases for the proposition that a complaint which fails to state a cause of action does not toll the statute of limitations. That seems reasonable enough, but in this case appellant has never suggested that the complaint filed February 8, 1965, failed to state a cause of action.

Appellee next cites Jorgensen v. Baker, 157 N.E.2d 773 (Illinois 1959). Appellant concedes that this case is in point, but suggests that the less formalistic -- but infinitely more rational -- decision of the Illinois Supreme Court (Jorgensen was decided by a lower level appellate court) in Roth v. Northern Assurance Company, 203 N.E.2d 415 (Illinois 1964), should be of greater interest to this Court. In that case plaintiff sued five fire insurance companies in a federal

district court, and sometime more than twelve months after the loss occurred, the case was dismissed for want of the requisite jurisdictional amount. The insurance companies then defended against plaintiff's attempt to sue them in the state court on the grounds that the action was barred by the contractional limitations period. The Illinois court dismissed this contention on the ground that the saving statute, very similar to A.S. 09.10.240, set out on page 14 of appellant's opening brief, being remedial in nature must be liberally construed so as to protect appellant's right to a trial on the merits of his case. This Court should do the same.

Appellee cites the early Alaska Supreme Court case of Alaska Mines and Minerals, Inc., v. Alaska Industrial Board, 354 P.2d 376 (1960), as holding that a corporation not in good standing cannot bring a suit in any court, and then concludes that ". . . under Alaska law the plaintiff's complaint filed on February 8, 1965 was a nullity and of no legal effect." Appellee's brief at page 22.

Appellee's major premise is the unstated assumption that the facts of the two cases are reasonably alike. This simply is not so.

Alaska Mines and Minerals was 1) in appellee's

words, ". . . a suit by a corporation for an injunction to set aside and restrain the enforcement of an award of the Industrial Board." (Appellee's brief at page 21); 2) in plain English, an appeal from a Workmen's Compensation Board decision. This is one major difference. In Alaska Mines and Minerals, but not in the present case, there was a full hearing on the merits. In Alaska Mines and Minerals, but not in this case, there was no element of litigation by ambush. The Fulton Insurance Co. in the present case waited more than two years (after making full use of discovery procedures and obtaining a trial setting) to raise the question of the appellant's corporate standing; in Alaska Mines and Minerals the motion to dismiss was made in less than twenty days. In Alaska Mines and Minerals the lower court dismissed the appeal ("complaint") with prejudice; in this case the complaint was dismissed without prejudice. The appellee has cited the Superior Court's decision, and the reason therefor (appellee's brief at page 22), but has failed to point out the obvious implication: that the Supreme Court's decision in Alaska Mines and Minerals does not require that the Superior Court (or this Court, or any other) take the language of that case literally. Fulton Insurance Company did not appeal Judge Fitzgerald's decision of June 13, 1967.

CONCLUSION

For the foregoing reasons as stated in the arguments in the body of this brief, the United States District Court for the District of Alaska erred in granting the Fulton Insurance Company's motion for summary judgment, and the judgment should be reversed and the United States District Court for the District of Alaska should be instructed to proceed to hear plaintiff-appellant's cause of action.

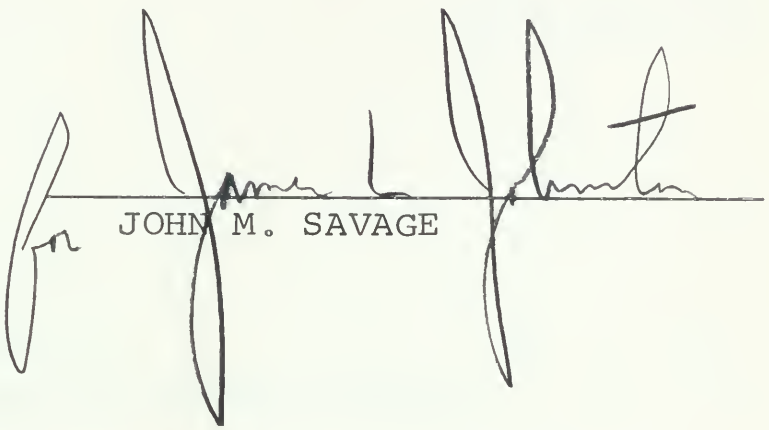
DATED this 5th day of September, 1968.

SAVAGE, ERWIN & CURRAN
Attorneys for Appellant

By: _____
John M. Savage

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined revised Rule 18 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with the rules.



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